

*** Center for Biological Diversity * Center for Food Safety * Defenders of Wildlife ***
*** Earthjustice * Klamath Siskiyou Wildlands Center ***
*** The Lands Council * Living Rivers & Colorado Riverkeeper ***
*** Natural Resources Defense Council * Oceana * Powder River Basin Resource Council ***
*** Southern Environmental Law Center * The Wilderness Society ***
*** Western Environmental Law Center ***

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Horst Greczmiel
Associate Director for NEPA Oversight
Council on Environmental Quality
722 Jackson Place, N.W.
Washington, DC 20503

Re: Comments on “Improving the Process for Preparing Efficient and Timely Environmental Reviews under the National Environmental Policy Act,” 76 Fed. Reg. 77,492-02 (Dec. 13, 2011)

Dear Mr. Greczmiel:

The undersigned organizations are writing to offer comments on the proposed guidance on “Improving the Process for Preparing Efficient and Timely Environmental Reviews under the National Environmental Policy Act” that the Council on Environmental Quality (CEQ) published for review and comment in the Federal Register on December 13, 2011. We commend CEQ for affording the public the opportunity to comment on this draft guidance document.

I. Introduction

We appreciate the steps the CEQ has taken to clarify National Environmental Policy Act (NEPA) implementation, but are concerned that the current draft guidance (1) contains some characterizations that may overstate the needs for improvement to the existing NEPA scheme; (2) overemphasizes an interest in speeding up NEPA review; and (3) understates the critical importance of public participation in all stages of the NEPA process. In the current political climate where NEPA is often wrongly vilified as the principal source of delay in project delivery, it is well worth emphasizing what we know is true with regard to NEPA and project delivery delay: that NEPA is not the ultimate culprit for delay and that a priority of any NEPA analysis should be that it be performed in a scope commensurate with the proposed action. As the draft guidance suggests, a key to efficient NEPA implementation is early and thorough identification of issues and early opportunities for public input. By identifying key concerns up front through stakeholder input, a NEPA analysis can be focused and thorough and, consequently, avoid the conflicts and problems that often attend attempts to “expedite” NEPA review. To the extent that NEPA efficiency can be improved, it should not come at the expense of meaningful public involvement and participation. Overall, we suggest the CEQ continue to emphasize and encourage public involvement, by adopting the following recommendations, which will thereby bring NEPA implementation towards the statute’s stated goal of promoting better informed agency decisionmaking for those decisions that may significantly affect the quality of the environment.

II. Recommendations

a. CEQ Should Make It Clearer That the Guidance Is Intended to Clarify and Explain How the Existing NEPA Process Is Already Efficient and Effective.

The draft guidance bills itself and is titled “*Improving the Process for Preparing Efficient and Timely Environmental Reviews under the National Environmental Policy Act.*” The White House press release dated December 7, 2011 also markets this guidance as “part of CEQ’s broader effort to *modernize* and reinvigorate Federal agency implementation of NEPA” and emphasizes that it also “supports the goals of President Obama’s August 31, 2001 Memorandum on ‘*Speeding Infrastructure Development through More Efficient and Effective Permitting and Environmental Review.*’” (emphasis added).

This packaging could suggest that NEPA regulations are being substantively changed, when actually, as the guidance itself notes, “CEQ is issuing this guidance for Federal departments and agencies to *emphasize and clarify those opportunities*” already within NEPA, 76 Fed. Reg. at 77,493, and that “[t]hat this guidance provides CEQ’s interpretation of existing regulations promulgated under NEPA and *does not change agencies’ obligations with regard to NEPA and the CEQ Regulations,*” *Id.* at 77,494 (emphasis added).

Since clarification is the true aim of the guidance, it should be characterized as such. This would avoid confusion about the nature of the guidance and would allow CEQ to focus on explaining and clarifying the ample existing opportunities for efficient, effective review under the current NEPA process. In this regard, the final guidance and CEQ’s unveiling of it should include additional statements highlighting NEPA’s success as a crucial and effective tool for ensuring sound, informed, and timely agency decisionmaking and public participation.¹

b. Stronger Commitments to Public Involvement in Environmental Assessments

To the extent that the Final Guidance can call for improvements to NEPA efficiency, one area that it can advocate for strengthening of NEPA implementation is with more meaningful public involvement and participation. One effective method to improve efficiency and timely NEPA review is to clarify current uncertainties within the CEQ NEPA regulations and case law in order to reduce the likelihood of administrative appeals and litigation. CEQ, however, has missed an opportunity in its draft guidance to address a significant issue of present uncertainty with the CEQ NEPA regulations: the level

¹ The Final Guidance could emphasize, up front, several statistics cited in a recent Congressional Research Service report. CRS, THE NATIONAL ENVIRONMENTAL POLICY ACT: BACKGROUND AND IMPLEMENTATION 28-29 (Feb. 29, 2008), available at <http://www.cnre.org/NLE/CRSreports/08Mar/RL33152.pdf> (“[T]here is little data available to demonstrate that NEPA currently plays a significant role in delaying federal actions . . . The perception that NEPA results in extensive delays and additional costs to the successful delivery of certain federal projects can be magnified when compliance with multiple environmental laws and regulations is required . . . Such ‘delays’ may actually stem from an agency’s need to complete a permit process or analyses required under separate statutory authority (e.g., the Clean Water Act or Endangered Species Act), over which the lead agency has no authority.”); *Id.* at 29 (“Litigation is probably the most often cited cause of NEPA-related project delays. Although this may have been the case in the past, the total number of NEPA-related cases in the past 10 years has been small (especially when compared with the total number of federal actions requiring some environmental review under NEPA). For example, in 2005, a total of 118 NEPA-related cases were filed.”); *Id.* at 30 (“factors ‘outside the NEPA process’ were identified as the cause of delay between 68% and 84% of the time”).

of public involvement that is necessary for environmental assessments (EAs). We believe the goals of NEPA will be better achieved if the guidance makes stronger commitments to public participation in the EA process.

The CEQ NEPA regulations are clear that meaningful public involvement is a key element of NEPA, including when EAs are prepared. *See, e.g.*, 40 C.F.R. §§ 1500.1(b) (“NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken,” and “public scrutiny [is] essential to implementing NEPA”); 1500.2(d) (federal agencies must “[e]ncourage and facilitate public involvement in decisions which affect the quality of the human environment”); 1501.4(b) (agencies “shall involve . . . the public, to the extent practicable, in preparing [environmental] assessments”); 1506.6(a) (agencies shall “[m]ake diligent efforts to involve the public in preparing and implementing their NEPA procedures”); 1506.6(b) (agencies shall “[p]rovide public notice of NEPA-related hearings, public meetings and the availability of environmental documents”); 1506.6(d) (agencies shall “[s]olicit appropriate information from the public”). Similarly, the courts are clear that a primary purpose of NEPA is to “guarantee that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and implementation of that decision.” *Robertson v. Methow Valley Citizens*, 490 U.S. 332, 349 (1989).

Despite the importance of public involvement in the NEPA process, CEQ has not taken the opportunity to clarify the actual extent of public involvement that is required for EAs. The agencies, courts and the public are thus left to continue arguing over this issue, which at present has culminated in a confusing holding on this issue from the Ninth Circuit:

We hold today that the circulation of a draft EA is not required in every case. We do not say that it is always required or that is never required. . . . [W]e now adopt this rule: An agency, when preparing an EA, must provide the public with sufficient environmental information, considered in the totality of circumstances, to permit members of the public to weigh in with their views and thus inform the agency decision-making process.

Bering Strait Citizens for Responsible Resources Development v. U.S. Army Corps of Engineers, 511 F.3d 1011, 1025-26 (9th Cir. 2008).

Providing a draft EA to the public is often the best way to engage the public. In some cases, the public remains unaware of the environmental factors an agency is considering in a decision if a draft EA is not shared. For example, the Bureau of Land Management (BLM) typically uses EAs to support approval of drilling permits. While the agency posts a “notice of staking” indicating its interest in a drilling permit in the applicable field office, this notice does not contain any analysis of environmental impacts. The site-specific analysis of environmental impacts is not completed until after this notice of staking is provided. BLM and other agencies could include a link to draft environmental assessments in its NEPA register. This would provide an efficient way to involve the public in analysis of environmental impacts as NEPA requires prior to finalizing drilling decisions. CEQ’s guidance should encourage this kind of approach.

CEQ should revise the draft guidance in order to clarify the level of public involvement that is required for EAs. More specifically, due to the critical importance of public involvement in the NEPA process, CEQ should clarify that NEPA requires concerned members of the public to be afforded the

opportunity to review and submit comments on draft EAs. In due recognition of the importance of meaningful public involvement during the environmental review process, the CEQ NEPA regulations make clear that draft EISs must be subject to public comment and review, and there is no reason for CEQ or federal agencies to treat draft EAs any differently on this important issue. There is also another important opportunity for clarification around this issue of public participation with regard to categorical exclusions, which are often the subject of concern due to lack of notice, and which is discussed in detail in the scoping section below. Clarification on these issues from CEQ would strengthen public participation and thereby improve the quality of the ultimate agency decisions, and would also increase the likelihood of efficient and timely environmental reviews by decreasing current uncertainties and confusion.

c. Scoping for Environmental Assessments and Categorical Exclusions

i. Scoping for Environmental Assessments

The draft guidance recognizes the importance of the initial scoping process for effectuating integration, avoiding duplication, and focusing the NEPA review. 76 Fed. Reg. at 77496. However, in a further clouding of the level of public participation that is required for EAs, the draft guidance indicates that scoping is not mandatory for EAs. *Id.* (stating that agencies can “choose” to take advantage of scoping when preparing an EA). Although the regulations may not require scoping for EAs, the regulations do list scoping as a way in which agencies “shall reduce excessive paperwork. 40 C.F.R. § 1500.4(g) (stating that agencies “shall reduce excessive paperwork by... [u]sing the scoping process”).

Just as scoping can increase the efficiency and focus on an EIS, the same again holds true for an EA. Moreover, through scoping, the public and other agencies can bring to the action agency’s attention whether there may be other connected, cumulative, or similar actions that may trigger the need for an EIS. 40 C.F.R. § 1508.25. Similarly, the scoping process for an EA can help inform the agency as to whether there are any unique characteristics of the proposed area, whether environmental effects may be controversial, whether there may be threatened or endangered species in the area, or other factors that may trigger the need for an EIS. 40 C.F.R. § 1508.27(b). By notifying the public, accepting comments, and determining up front whether there is the potential for significant impacts, the action agency can much more effectively and efficiently determine the potential need for an EIS or make its case why an EA is sufficient. In light of the guidance’s stated goal of enhancing efficient and effective environmental review, the CEQ should revise the guidance to urge agencies to make stronger commitments to using the scoping process with EAs.

ii. Scoping for Categorical Exclusions

The same reasons that scoping increases efficiency for EAs hold true for categorical exclusions (CEs) as well. While scoping for EAs allows the public to bring to the agency’s attention information concerning the CEQ “significance” factors, scoping for CEs allows the public the opportunity to bring to the agency’s attention whether there may be extraordinary circumstances that would prohibit the use of a CE for the particular proposal being considered. *See* 40 C.F.R. § 1508.4 (stating that agency procedures

must “provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect”).

The failure of the CEQ to directly address this issue has again resulted in confusion, which eventually results in additional litigation and delay. For instance, CEQ has found that “[m]ost Federal agencies do not routinely notify the public when they use a categorical exclusion to meet their NEPA responsibilities.” CEQ Memorandum, “Establishing, Applying, and Revising Categorical Exclusions under the National Environmental Policy Act,” November 23, 2010, at p. 14. This is despite CEQ’s recognition that “the public may be able to provide an agency with valuable information, such as whether a proposal involves extraordinary circumstances or potentially significant cumulative impacts that can help the agency decide whether to apply a categorical exclusion.” *Id.* CEQ thus “encourages” (but does not require) agencies to determine “those circumstances in which the public should be engaged or notified before a categorical exclusion is used.” *Id.*

This has, not surprisingly, again resulted in uncertainty and increased litigation. *See e.g., Citizens for Better Forestry v. U.S. Dept. of Agriculture*, 2007 WL 1970096, *16 (N.D. Cal. July 3, 2007) (noting that, while the Forest Service’s procedures require scoping for all proposed actions, including those that would appear to be categorically excluded, “[t]he CEQ regulations do not set forth a specific procedure for scoping, but instead leave most of the decisions regarding scoping to the relevant federal agency.”) By urging agencies to adopt the use of scoping CEs when ground disturbing activities or controversy are likely, CEQ would resolve this uncertainty and better promote public participation and transparency in the NEPA process.

d. Adoption – Limit to Situations Where There Is Clear Overlap of Analysis

Additional clarification in the guidance is needed to explain under what specific circumstances adoption of another agency’s EA or EIS is warranted. In our experience, adoption is rarely justified or warranted because project-specific analysis is usually required to truly appreciate the scope of environmental impacts. For this reason, we believe CEQ should expressly limit adoption of EISs or EAs to situations where there is a clear overlap in analysis.

e. Incorporation by Reference – Clarify What Constitutes “Reasonably Available”

Although incorporating material by reference can potentially save time, it often occurs at the expense of transparency and public input. In our experience, documents incorporated are often difficult to find or are far from “reasonably available.” For NEPA to continue to promote public participation and transparency, it is imperative that key documents, such as those incorporated by reference, reach as wide an audience as possible. For this reason, we urge CEQ to clarify that documents are only “reasonably available” if they are both posted online *and* made available in hard copies either in reasonably accessible reading rooms of agencies or, ideally, filed in key regional and local libraries. In addition, the guidance should make clear that when an agency incorporates materials by reference, it must explain how those materials remain relevant and current to the review at issue.

f. Expediting Responses to Comments

i. Multiple Comments with Identical Content

The guidance rightly notes that agencies “should provide a reasonable and proportionate response to comments on a draft EIS by focusing on the environmental issues and information conveyed by the comments,” however, it misses an opportunity to provide guidance on agency practice in the case of multiple comments with identical content. A single substantive response by the agency is appropriate under such circumstances, but the record should record the number of comments received. How many people hold a particular view is an important factor when an agency is making a decision that affects public resources about which many people care deeply. To address this point, we propose the addition of the following language to CEQ’s guidance: “Under some circumstances, an agency may receive numerous comments with identical content. Agencies should record the number of responses received with the identical content. The quantity of responses can help inform a decision when public resources are involved. Agencies can provide a single substantive response to identical comments received.”

ii. “Nonsubstantive” Response from Agencies

This section on expediting responses to comments is also an opportunity for CEQ to stress and clarify that the action agency should respond to concerns expressed in comments clearly and thoroughly. Public comments should only rarely be dismissed as “nonsubstantive.” In our experience, agencies too often will simply respond “nonsubstantive” and refuse to address a public comment. Although there are certainly circumstances in which a public comment may fall in this category, such a response should be an exception to the general rule that agencies should thoughtfully and adequately respond to comments. Abuse of the “non-substantive” response results in public distrust of agencies and ultimately can lead to more conflict and delays. For this reason, CEQ should clarify appropriate use of the “nonsubstantive” response and emphasize that it is only appropriate in limited circumstances.

III. Conclusion

Thank you for this opportunity to comment on the draft guidance. We appreciate the CEQ’s effort to find ways to increase the efficiency of NEPA reviews by adopting the sensible approach of exploring flexibilities within the regulations. However, as stated above, we are concerned that this guidance will be misunderstood as a tacit affirmation of the persistent, but demonstrably false, claim that NEPA is a primary source of project delay and in need of reform. We know NEPA works and that NEPA is achieving its goal of promoting better, more informed, government decisions. Nevertheless, we are also aware that there is always more room to make the NEPA process more efficient. The best way to promote efficiency is to make stronger commitments to public participation in all stages of the NEPA process. We therefore strongly urge CEQ to continue to promote public participation, transparency, and efficiency by adopting the recommendations outlined above.

We truly appreciate your thoughtful consideration of these comments and would be pleased to discuss these issues further if that would be useful.

Sincerely,

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